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In the Supreme Court of the United States

OCTOBER TERM, 1992

RICHARD LYLE AUSTIN,

Petitioner

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF FOR
AMERICAN ALLIANCE FOR RIGHTS
AND RESPONSIBILITIES,
COMMUNITY ANTI-DRUG COALITIONS OF AMERICA,
SULPHUR SPRINGS ACTION LEAGUE,
LOGAN CIRCLE COMMUNITY ASSOCIATION,
EAST DUPONT CIRCLE COMMUNITY ASSOCIATION,
UNITED CITIZENS AGAINST NARCOTICS,
TOGETHER! THURSTON COMMUNITIES FOR
A DRUG-FREE YOUTH,
AND GEORGE F. WARD
AS AMICI CURIAE IN SUPPORT OF RESPONDENT

EDWARD S.G. DENNIS, JR.
PETER BUSCEMI
MORGAN, LEWIS
& BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7000

ROGER L. CONNER
ROBERT TEIR *
AMERICAN ALLIANCE FOR
RIGHTS & RESPONSIBILITIES
1725 K Street, N.W.
Washington, D.C. 20006
(202) 785-7844

* Counsel of Record for
Amici Curiae

QUESTIONS PRESENTED

1. Whether the Eighth Amendment's prohibition against excessive fines applies to civil forfeiture proceedings.
2. Whether, if the Eighth Amendment applies, the forfeitures in this case violate the Excessive Fines Clause.

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INTEREST OF AMICI CURIAE

Amici are a group of national, regional, and local citizens groups and a county prosecutor acting in his individual capacity, all dedicated to combatting the per-

nicious effect of illicit drugs and drug-related crimes.¹ Strengthening the role of community-interested groups

¹ The *American Alliance for Rights and Responsibilities* ("AARR") is a non-profit public interest group dedicated to restoring a pragmatic balance between rights and responsibilities in American life. Through research, public education, and litigation efforts, the AARR works to encourage community service, combat substance abuse, protect public safety, and promote the amenability of public spaces to common uses. AARR has published the only national survey to identify effective, balanced, and constitutional techniques for combatting open-air drug markets: R. Conner & P. Burns, *The Winnable War: A Community Guide to Eradicating Street Drug Markets* (1991).

The *Community Anti-Drug Coalitions of America* ("CADCA") is a nationwide umbrella organization which has grown out of the community-level organizing efforts of the President's National Drug Advisory Council. CADCA provides technical assistance, conferences, workshops, and legal guidance to its member community groups.

The *Sulphur Springs Action League* is a grass-roots community organization in the Tampa, Florida area dedicated to fighting open-air street drug markets and promoting safe, healthy neighborhood environments.

The *Logan Circle Community Association* and the *East DuPont Circle Community Association* are devoted to strengthening community life in their respective inner-city neighborhoods near the heart of Washington, D.C. Both associations are active supporters of motor vehicle and other asset forfeitures as effective tools to combat street drug trafficking, prostitution, and violence in their communities.

United Citizens Against Narcotics is a city-wide coalition of community activists in the Pittsburgh, Pennsylvania area engaged in a wide array of anti-drug public service activities.

Together! Thurston Communities for a Drug-Free Youth is active in efforts to combat drug abuse in the Olympia, Washington area. *Together!* has also participated in White House sponsored national anti-drug conferences.

Finally, *George F. Ward* is an attorney and Chief Assistant Prosecutor for Wayne County, Michigan. Mr. Ward has been instrumental in the design and implementation of the County's PUSH-

such as amici in the fight against illegal drugs has been identified as "one of the cornerstones" of the national drug prevention strategy. The White House, *National Drug Control Strategy: Progress in the War on Drugs 1989-1992*, p. 10 (January 1993).

Because of petitioner's contentions that an Eighth Amendment proportionality requirement (i) applies to civil *in rem* forfeiture proceedings directed at property tainted by drug crimes, and (ii) should be determined by reference to the market value of the contraband involved, rather than by reference to the gravity inherent in all drug crimes, amici wish to bring to the Court's attention certain of the critical countervailing considerations bearing on the issues presented.

Amici are especially concerned with the under-recognized and grave damage inflicted on their neighborhoods and communities by flagrant open-air street drug markets. More particularly, amici have observed how civil asset forfeiture—as a complement to other methods of public law enforcement—has proven effective in combatting these drug markets. Indeed, in the pursuit of illicit drug *buyers*, automobile forfeiture has been singularly successful in tackling a facet of the drug problem that has otherwise proven to be largely immune from the reach of law enforcement.

Although the specific facts of petitioner's drug crime might initially appear somewhat removed from these concerns, any decision by this Court as to the applicability of Eighth Amendment proportionality analysis to civil *in rem* asset forfeiture proceedings in the context of the enforcement of anti-drug laws will have direct consequences for amici's common mission.

OFF program (when Purchasers Use our Streets and Highways, Opt For Forfeiture) which has proven highly effective as a means to attack the blight of open-air drug markets.

The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk under Rule 36.3 of the Rules of this Court.

SUMMARY OF ARGUMENT

For the reasons stated in the government's brief, amici submit that the Eighth Amendment is not applicable to civil *in rem* forfeiture proceedings. However, should this Court determine, despite the civil *in rem* nature of this proceeding, that the Eighth Amendment does apply to forfeitures of drug-related property and that a proportionality test is appropriate, amici contend that the proper proportionality analysis should weigh the significance of the forfeiture against the potential harm posed by the underlying misconduct giving rise to the forfeiture proceeding. In the context of criminal drug activity, amici submit, the gravity of the underlying misconduct is such that forfeiture could be grossly disproportional only in rare instances (and certainly not here). This view recognizes the seriousness of all illicit drug crimes as determined by Congress (and especially those committed in flagrant drug markets) and affords the certainty of result and ease of application essential to deterrence and needed to discourage meritless and highly fact-specific litigation challenges.

ARGUMENT

I. THE PLAGUE OF ILLICIT DRUGS IS AMONG THE MOST SERIOUS PROBLEMS FACING OUR NATION.

In arguing for an Eighth Amendment proportionality test for civil forfeitures of drug-related property, both petitioner and the amici supporting his position attempt to gloss over the central facts in this case: petitioner is, by his own plea, guilty of dealing cocaine, and the property subject to forfeiture in this *in rem* proceeding played a crucial role in facilitating petitioner's drug crime. Any meaningful proportionality analysis in this context *must* take into account the grievous social consequences of all drug crimes and the human, social, and economic devastation they leave in their wake.

Indeed, it is the inestimable damage, both direct and indirect, caused by drug dealers and abusers alike, that is the relevant cost against which the magnitude of the forfeiture must be measured. To assess the severity of the relevant underlying misconduct by reference solely to the market value of the contraband viewed in isolation is to defy common sense and to deny the harms wrought by illegal drugs on our citizens, our communities, and our country as a whole. *See, e.g., People v. Broadie*, 37 N.Y.2d 100, —, 332 N.E.2d 338, 342, *cert. denied*, 423 U.S. 950 (1975) (primary consideration in assessing gravity of criminal conduct is the harm it causes to society).²

² Indeed, if petitioner's "value of contraband versus value of seized assets" approach were to be adopted, it would tend—in the context of civil forfeiture actions against automobiles of open-air drug market customers—to have the anomalous effect of conferring a greater level of protection on the more expensive cars driven by more affluent drug criminals. The Eighth Amendment's prohibition against excessive fines should not be converted into a safe haven for Jaguars and Mercedes Benzes driven by drug sellers or buyers.

If constitutional proportionality analysis is to be applied at all in forfeiture proceedings under 21 U.S.C. § 881, it must not be divorced from a recognition of the societal ills inflicted by drug trafficking and abuse.

This Court has repeatedly recognized that the scourge of illegal drugs constitutes "one of the greatest problems affecting the health and welfare of our population." *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668 (1989). Congress too, as part of the same Comprehensive Crime Control Act of 1984 that amended the forfeiture provisions of 21 U.S.C. § 881(a), made the following express findings:

- (1) The flow of illegal narcotics into the United States is a major and growing problem.
- (2) The problem of illegal drug activity falls across the entire spectrum of Federal activities both nationally and internationally.
- (3) Illegal drug trafficking is estimated by the General Accounting Office to be an \$80,000,000,000 per annum industry in the United States.
- (4) The annual consumption of drugs has reached epidemic proportions.
- (5) Despite the efforts of the United States Government and other nations, the mechanisms for smuggling opium and other hard drugs into the United States remain virtually intact and United States agencies estimate that they are able to interdict no more than 5 to 15 percent of all hard drugs flowing into the country.
- (6) Such significant indicators of the drug problem as drug-related deaths, emergency room visits, hospital admissions due to drug-related incidents, and addiction rates are soaring.
- (7) Increased drug trafficking is strongly linked to violent, addiction-related crime and recent studies have shown that over 90 percent of heroin

users rely upon criminal activity as a means of income.

- (8) Much of the drug trafficking is handled by syndicates, a situation which results in increased violence and criminal activity because of the competitive struggle for control of the domestic drug market.
- (9) Controlling the supply of illicit drugs is a key to reducing the crime epidemic confronting every region of the country.

Public Law 98-473, Section 1302(a), 98 Stat. 1837, 2168 (1984), *repealed by* Public Law 100-690, § 1007(a)(3), 102 Stat. 4181, 4187 (Anti-Drug Abuse Act of 1988).

By any measure, this intractable plague is of epidemic proportion. It has been estimated that Americans consume approximately sixty percent of the world's illegal drug output. J.S. Lang, "America On Drugs," *U.S. News & World Report*, p. 48 (July 28, 1986). Even the most conservative estimates place the number of drug abusers in this country "well into the millions." Department of Justice, *Drug Trafficking: A Report to the President of the United States*, p. 2 (August 3, 1989).

Of graver significance, however, than the direct harm suffered by abusers of illicit drugs is the collateral devastation drugs bring to our nation's social fabric. As a recent National Crime Prevention Council publication has explained:

Communities across the country are struggling to deal with the drug issue, a crime problem that has taken on crisis proportions. Over and over again, in both urban and rural settings, it has been demonstrated that an active drug trade precipitates and perpetuates the disintegration of neighborhoods. Drug trafficking sends tremors through the entire community, even when most of the activity is concentrated in particular neighborhoods. It signals a community out of control, a hostile environment for

business, a dangerous place to raise a family. Every part of the United States suffers from the effects of illicit drugs and related crime: violence, weakened local economies, suburban flight, joblessness, and fear. . . . In those neighborhoods where a drug trade visibly flourishes, residents' daily lives are disrupted. Children avoid areas near schools and playgrounds where drugs are sold; they are enticed to take part in drug trafficking for money or other material goods. Other residents, intimidated by loitering groups, retreat behind barred windows and locks. Neighborhood businesses close their doors; community ties erode. Depression and isolation grip the whole area.

Creating a Climate of Hope: Ten Neighborhoods Tackle the Drug Crisis, p. 1 (1992). In particular, flagrant drug markets have the effect of inhibiting community life, perpetuating drug abuse by tempting recovering addicts and the young, and promoting negative values by suggesting a spurious shortcut to material success.³

Among the cruelest aspects of the illegal drug plague is the toll it takes on our nation's youngest, most innocent victims. A recent report commissioned by the Senate Judiciary Committee reveals that over the past three years approximately 900,000 American children have been addicted to some kind of illicit drug. Inter Press Service, "United States: Anti-Drug Campaign A Failure Says Senate Report" (September 10, 1992).

Beyond the immediate health threat (and its concomitant cost) posed by infant addiction, child neglect and abuse by parents on drugs are yet another facet of the problem. In fact, a report issued by the New York City Human Resources Administration, after demonstrating a strong correlation between parental drug abuse by parents and child deaths resulting from abuse and neglect,

³ See also R. Conner & P. Burns, *The Winnable War: A Community Guide to Eradicating Street Drug Markets*, pp. 5-8 (1991) (describing the deleterious impact of street drug markets on the neighborhoods they occupy).

concluded: "Drug abuse by parents, a problem which is apparently growing at an alarming rate, continues to pose the greatest single threat to children." Quoted in P. Kerr, "Crack Addiction: The Tragic Toll on Women and Their Children," *The New York Times*, p. B1 (February 9, 1987) (emphasis added). It scarcely needs to be noted that the child abuse, neglect, and abandonment associated with drug-abusing parents "is placing unprecedented strains on the family court system and social agencies." N. Lewis, "Child Neglect, Abuse Up 60% in D.C.," *The Washington Post*, p. A1 (May 20, 1992).

Equally alarming is the overwhelming correlation between illicit drugs and criminal activity. According to one federal district judge, more than fifty percent of the federal prison population of roughly 67,000 inmates are serving time for drug offenses. L.F. Oberdorfer, "A Safety Valve for U.S. Prisons," *The Washington Post*, p. A21 (June 23, 1992). Of the nation's local jail populations, nearly a quarter of the inmates are incarcerated due to drug offenses. *Alcoholism & Drug Abuse Week*, vol. III, no. 32, p. 3 (August 28, 1991).

In addition to drug offenses themselves, illegal drug use and trafficking are integrally linked to other serious crimes. Most of the 71,000 people murdered in this country over the past three years are dead because of drugs. Inter Press Service, "United States: Anti-Drug Campaign a Failure Says Senate Report" (September 10, 1992) (citing Senate Judiciary Committee report). Indeed, a 1988 survey of state prisoners incarcerated for murder revealed that twenty-eight percent admit to having been under the influence of drugs at the time they committed the killing. Bureau of Justice Assistance, U.S. Department of Justice, *1988 Report on Drug Control*, p. 19 (1989). As for violent crimes generally, the correlation was even greater, with more than a third of state prisoners admitting to being under the influence of illicit drugs when they committed the violent offense.

Id. at 2. It has been reported that fully forty-two percent of prisoners serving time for robbery were using drugs when they committed their crimes. J. Dillin, "Drug Use Linked to Many Crimes in U.S.," *The Christian Science Monitor*, p. 2 (September 5, 1989).

Property crimes like burglary, auto theft, and larceny are frequently committed by drug addicts to feed their habits. *Id.* A study by the Bureau of Justice Statistics showed that roughly a third of those persons in jail for burglary and robbery committed their crimes in order to raise money to feed their drug addictions. "Drugs Strongly Linked to Robbery and Burglary," *Alcoholism & Drug Abuse Week*, p. 3 (August 28, 1991).

Statistical evidence compiled by the National Institute of Justice/Drug Use Forecasting Program reveals the alarming degree to which drug use and criminal behavior are linked. The data appearing as Appendix A hereto demonstrates—by means of urinalysis testing in major cities across the country from 1988 through 1991—that upwards of eighty percent of criminal arrestees routinely test positive for illegal drug use. Appendix B hereto shows the same overwhelming correlation, broken down by the offense charged at the time of arrest.

No less disturbing are the figures on juvenile crime linked to drug abuse. A study conducted in 1991 by the Washington, D.C. Pretrial Services Agency showed that seventeen percent of juveniles arrested in the District tested positive for cocaine use, with fully thirty percent of those arrested on weapons charges testing positive for drug use. N. Lewis, "Drug Use Up Among Young Suspects," *The Washington Post*, p. D1 (August 23, 1991).

In addition to the destructive impact of drug trafficking on the lives of individuals, families, and communities, the economic costs to society as a whole are profound. Federal drug control funds expended for fiscal year 1993 total \$12.7 billion dollars. The White House, *National Drug Control Strategy: A Nation Responds to*

Drug Use, p. 8 (January 1992). As of 1990, nearly 19,000 state and local law enforcement officers were devoted *full time* to special drug enforcement units. Bureau of Justice Statistics, *National Update*, p. 6 (July 1992). In this era of deficit reduction and fiscal belt-tightening, it is readily apparent that public funds diverted to the investigation and prosecution of drug criminals like petitioner are thereby unavailable for alternative public purposes.

Moreover, the underground economy in which petitioner was a knowing merchant is believed, by Internal Revenue Service estimates, to amount to nearly \$30 billion a year. Department of Justice, *Drug Trafficking: A Report to the President of the United States*, p. 3 (August 3, 1989). Of course, that economy operates outside the reach of the income tax system to which the rest of society is subject, thereby magnifying even more the adverse fiscal impact of drug trafficking.

Further compounding the economic damage inflicted by drug abuse (and the trafficking that makes it possible) is its effect on the workplace. The economic burden attributable to slowed productivity, absenteeism, lateness, and irrational decision-making by drug using workers was estimated as of 1983 to amount to as much as \$25 billion dollars. S. Rep. No. 278, 98th Cong., 2d Sess. 12, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3587, 3598 (Report of Judiciary Committee on National Narcotics Act of 1984). Indeed, drug abuse at the workplace "is a problem of crisis proportions." Department of Justice, *Drug Trafficking: A Report to the President of the United States*, p. 5 (August 3, 1989). Thus, a 1984 government study estimated the annual cost of unrealized productivity due to drug use at \$33 billion. *Id.* Increased workplace accidents and workers' compensation and health benefit claims attributable to illicit substance abuse add still further to the economic burden. *Id.*

Although the sheer magnitude and multiplicity of the problem prevents precise valuation, it has been estimated that "[t]he illegal-drug crisis in the United States now costs the nation at least \$100 billion annually—or \$1,500 a year for a typical family of four." J. Dillin, "War on Drugs: Bush Prepares to Launch Damage Control Strategy," *The Christian Science Monitor*, p. 1 (September 5, 1989).

Much as they might prefer it otherwise, petitioner and other participants in the illicit drug trade cannot divorce the culpability of their drug crimes from the devastating consequences for which they are inextricably responsible.

II. CONGRESS HAS DETERMINED THAT SIGNIFICANT CIVIL *IN REM* FORFEITURES ARE A NECESSARY COMPLEMENT TO CRIMINAL ENFORCEMENT IN COMBATTING THE SCOURGE OF ILLEGAL DRUG MARKETS, TRAFFICKING, AND ABUSE.

In enacting the Comprehensive Crime Control Act of 1984 (Public Law 98-473), of which the Comprehensive Forfeiture Act of 1984 was a part, Congress revisited and broadened the scope of Section 881(a)'s civil forfeiture provisions. The legislative history of the Act is unequivocal that its purpose, in relevant part, was "to enhance the use of forfeiture" S. Rep. No. 225, 98th Cong., 2d Sess. 191, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3374 (Report of Judiciary Committee). More specifically, the Senate Report on these forfeiture provisions explained: "Clearly, if law enforcement efforts to combat . . . drug trafficking are to be successful, they must include an attack on the economic aspects of these crimes. Forfeiture is the mechanism through which such an attack may be made." *Id.*

Animating this legislative purpose of expanding these forfeiture provisions was Congress' express recognition of the gravity and magnitude of the nation's illicit drug

problem. As the Third Circuit has observed, this legislative determination constitutes "a permissible civil response by Congress to complement criminal law enforcement directed at a most corrosive force in our society." *United States v. One 107.9 Acre Parcel of Land Located in Warren Township, Bradford County, Pa.*, 898 F.2d 396, 401 (3d Cir. 1990).

Civil *in rem* asset forfeiture, as intended by Congress, has proven to be a highly effective complement to criminal drug law enforcement. Many drug criminals use automobiles to transport illicit drugs to or procure them from drive-through street drug markets. These open-air markets destroy the neighborhoods they infest, while the dealers who supply them and the customers who sustain them are able to drive their cars away to safer, relatively crime-free neighborhoods. Civil asset forfeitures directed against drug-buyer vehicles have proven to be particularly effective in eradicating these street markets, thereby affording residents a chance to reclaim their neighborhoods and communities. The importance of drug law enforcement efforts focusing on the consumers of illicit drugs has gained even greater congressional recognition in recent years. See Public Law 100-690, title V, §§ 5001-5301 (Anti-Drug Abuse Act of 1988, User Accountability provisions). Thus, the "seizure and forfeiture of vehicles [and other crime-tainted assets] for violation of narcotics laws fosters the public interest." *United States v. One 1971 BMW 4-Door Sedan*, 652 F.2d 817, 821 (9th Cir. 1981).

Moreover, it must be kept firmly in view that it is within the unique competence of the legislature to assess the gravity of, and fashion remedies to address, the problems posed by criminal drug activity. See *Harmelin v. Michigan*, — U.S. —, 111 S. Ct. 2680, 2698 (Scalia, J.), 2703 (Kennedy, J.) (1991). Congress has unambiguously provided for the sort of civil *in rem* forfeiture challenged in this case, and has lucidly articu-

lated its reasons in so doing. The Eighth Amendment simply affords no basis for undermining this thoroughly reasonable legislative determination, particularly where such a compelling governmental interest has been demonstrated.⁴

III. ANY EIGHTH AMENDMENT GROSS DISPROPORTIONALITY TEST IN THIS CONTEXT SHOULD TAKE INTO ACCOUNT THE SERIOUSNESS OF THE HARM CAUSED BY CRIMES INVOLVING ILLEGAL DRUG MARKETS, TRAFFICKING, AND ABUSE.

As the government's brief shows, the weight of authority holds that civil *in rem* forfeiture proceedings are altogether beyond the compass of the Eighth Amendment. However, if the Eighth Amendment were somehow deemed to apply to such forfeitures, and if a concept of proportionality were deemed to be part of that application, the proper constitutional standard would be one of *gross disproportionality*, and bearing no relationship to ongoing criminal activity. See, e.g., *Solem v. Helm*, 463 U.S. 277, 290-92 (1983); *United States v. Certain Real Property, 566 Hendrickson Blvd., Clawson, Oakland County, Mich.*, — F.2d —, 1993 WL 47733 (6th Cir. February 26, 1993).

This constitutional standard is highly deferential, coming into play (if at all) only in the most extreme circumstances. *United States v. One 107.9 Acre Parcel of Land, Warren Twp., Pa.*, 898 F.2d 396, 400 (3d Cir.

⁴ Cf. *Harmelin*, *supra*, 111 S. Ct. 2680 (upholding mandatory life sentence without possibility of parole for possession of 672 grams of cocaine by defendant with no prior felony convictions); *Hutto v. Davis*, 454 U.S. 370 (1982) (upholding forty-year prison sentence plus fine of \$20,000 for possession and distribution of nine ounces of marijuana); *Gutierrez v. Moriarty*, 922 F.2d 1464, 473 (10th Cir.), *cert. denied*, — U.S. —, 112 S. Ct. 140 (1991) (upholding life sentence meted out for distributing "minuscule" quantity of heroin).

1990) ("Only the clearest proof will suffice to support a finding of unconstitutionality."); *United States v. Contreras*, 937 F.2d 1191, 1195 (7th Cir. 1991) ("[N]o small disproportion will do . . ."); *United States v. Certain Real Property and Premises, 38 Whalers Cove Drive, Babylon, N.Y.*, 954 F.2d 29, 38 (2d Cir. 1992) ("The Eighth Amendment proscribes only extreme punishments.").

Of course, to identify a "gross disproportionality" standard is to beg the question: Against what is the magnitude of the forfeiture to be measured? Whatever test might be adopted, its basic focus should be on the relationship between the forfeiture and the gravity of the crime committed. The gravity of the offense is, in turn, measured by reference not simply to the street value of the illicit drugs involved but also to the harmful nature of the crime and its collateral consequences. *United States v. Sarbello*, — F.2d —, 1993 WL 20118, *6 (3d Cir. February 2, 1993) ("moral gravity of the crime measured in terms of the magnitude and nature of its harmful reach"). See *United States v. Certain Real Property and Premises, 38 Whalers Cove Drive, supra*, 954 F.2d at 38-39 (recognizing "serious threat to individuals and society posed by drug offenses," in rejecting Eighth Amendment challenge to civil forfeiture); *United States v. Busher*, 817 F.2d 1409, 1415 (9th Cir. 1987) (harm caused by defendant's conduct, including "whether the crime has severe collateral consequences, e.g., drug addiction," is relevant consideration in assessing gravity of offense); *People v. Broadie*, 37 N.Y.2d 100, 332 N.E.2d 338, 342, *cert. denied*, 423 U.S. 950 (1975) ("In assessing the gravity of a criminal offense, the primary consideration is the harm it causes to society.").

Petitioner's contrary argument that the forfeiture should be examined with reference merely to the market value of the illegal substance at issue is a variation of

the de minimis argument that has consistently been rejected by the courts. See, e.g., *United States v. Certain Real Property, 566 Hendrickson Boulevard, Clawson, Oakland County, Michigan*, — F.2d —, 1993 WL 47733 (6th Cir. February 26, 1993) (“Forfeiture has been enforced even for truly de minimis infractions.”); *United States v. Premises Known as 3639 2nd Street, Northeast, Minneapolis, Minnesota*, 869 F.2d 1093 (8th Cir. 1989) (“Nor do we find merit in any underlying ‘de minimis’ argument that the sale of a relatively small amount of cocaine does not warrant forfeiture of the house”); *United States v. A Parcel of Land with a Building Located Thereon at 40 Moon Hill Road, Northbridge, Massachusetts*, 884 F.2d 41, 44-45 (1st Cir. 1989) (rejecting argument that forfeiture of home for allegedly de minimis infraction violated the Eighth Amendment); *United States v. 1985 BMW 635*, 677 F. Supp. 1039, 1042 (C.D. Cal. 1987) (forfeiture of \$35,000 automobile used to transport 6.23 grams of cocaine and 2.78 grams of concentrated cannabis found not ‘grossly disproportionate’ to the offense committed).

Both federal and state governments have enacted legislation providing for the forfeiture of firearms, vehicles, and other instrumentalities used in the violation of fish and game laws. See, e.g., *Smith, Owner of the Sloop Volant v. Maryland*, 59 U.S. (18 Howard) 71, 75 (1855) (upholding seizure of fishing vessel); *United States v. Van Horn*, 836 F.2d 1235 (9th Cir. 1988) (upholding seizure of aircraft); *In re Forfeiture of One 1984 Ford Van 150, One 30-30 Winchester*, 521 So. 2d 224 (Fla. Dist. Ct. App. 1988) (forfeiture provisions in statute prohibiting taking of certain wildlife out of season are mandatory); *North Dakota v. Backer*, 331 N.W.2d 4 (N.D. 1983) (forfeiture of vehicle unlawfully used in taking game). If forfeitures of such magnitude are appropriate to protect fish and game, they are, *a fortiori*, appropriate to protect human lives and communities from the scourge of illegal drugs.

Other courts that have discussed forfeiture of drug crime-tainted assets in light of Eighth Amendment concerns have virtually all held that the forfeiture was not grossly disproportional. Although there may conceivably be situations where a forfeiture challenged as an excessive fine would not survive judicial scrutiny under the Eighth Amendment, this case is not one of them.⁵

Petitioner and the amici supporting his position urge this Court to adopt an Eighth Amendment proportionality analysis premised upon “the need for intensive case-by-case factual determinations.” *Brief Amicus Curiae of the National Association of Criminal Defense Lawyers*, at 15. The Eighth Amendment was never intended, however, to serve as an invitation to burdensome, protracted, and ultimately meritless litigation. *Solem v. Helm*, 463 U.S. 277, 290 (1983) (proportionality challenges outside of death penalty context should be “extremely rare”). To be effective for its congressionally intended purpose, the propriety of civil *in rem* forfeiture of property used to facilitate drug crime must be freed from doubt in substantially all cases.

CONCLUSION

For all of the reasons stated above, as well as those set forth in the government’s brief, amici respectfully request this Court to affirm the opinion of the Eighth Circuit. However, should this Court determine civil *in rem* forfeiture proceedings are within the purview of the Eighth Amendment, and that a proportionality test is applicable, amici submit that the focal point of analysis

⁵ See, e.g., *United States v. Certain Real Property, 38 Whalers Cove Drive*, 954 F.2d 29 (2d Cir. 1992) (forfeiture of entire \$68,000 interest in condominium in connection with sale of small amount of cocaine valued at \$250 not grossly disproportional). Cf. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) (seizure from innocent owner of \$19,800 yacht on which single marijuana cigarette was found did not offend due process).

should be the severe harm caused by drug crimes (as recognized by Congress) and not merely the street value of the particular drugs involved.

Respectfully submitted,

EDWARD S.G. DENNIS, JR.
PETER BUSCEMI
MORGAN, LEWIS
& BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7000

ROGER L. CONNER
ROBERT TEIR *
AMERICAN ALLIANCE FOR
RIGHTS & RESPONSIBILITIES
1725 K Street, N.W.
Washington, D.C. 20006
(202) 785-7844

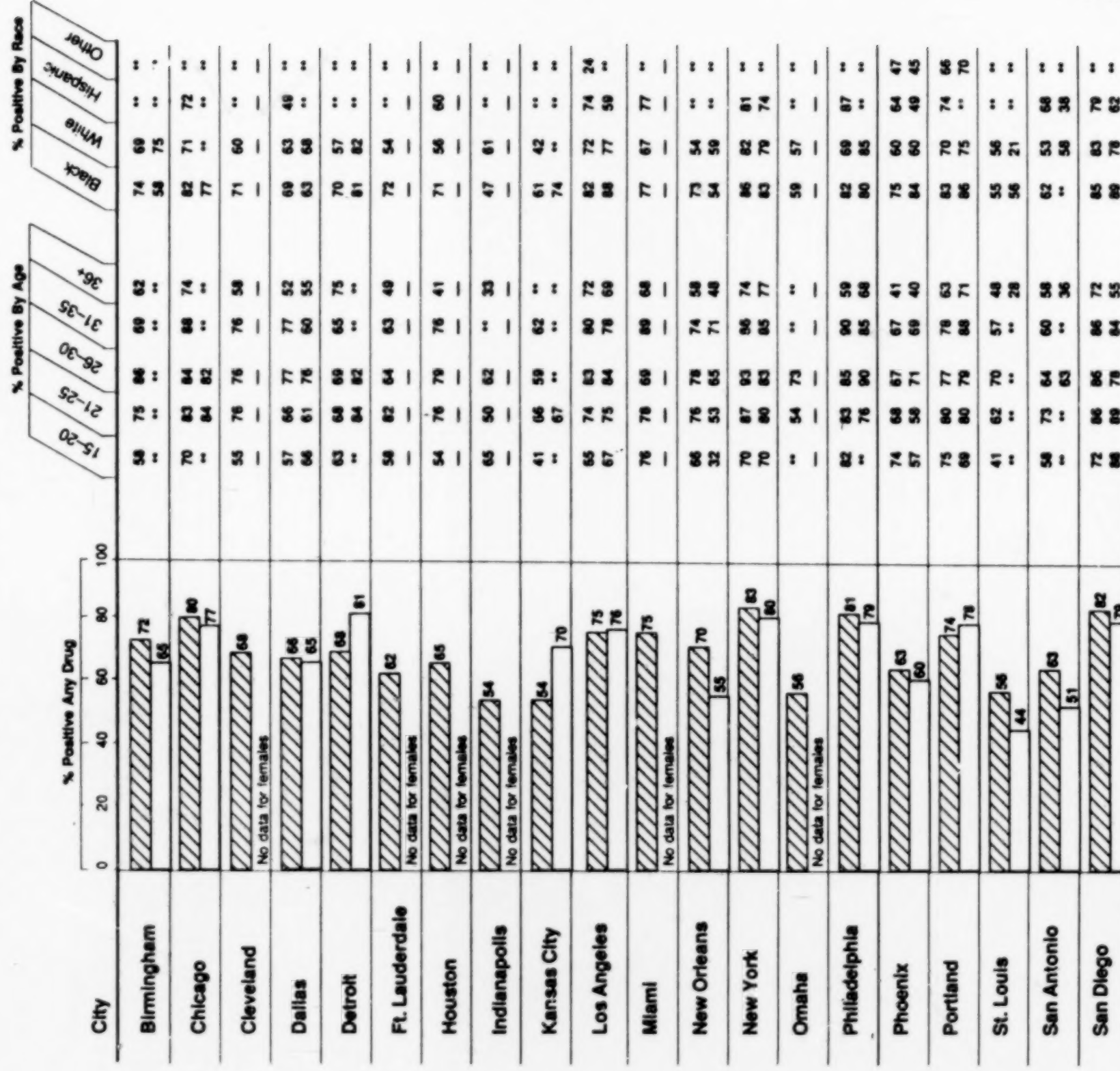
March 31, 1993

* Counsel of Record for
Amici Curiae

APPENDICES

APPENDIX A

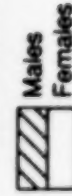
Any Drug Use by Male and Female Arrestees*



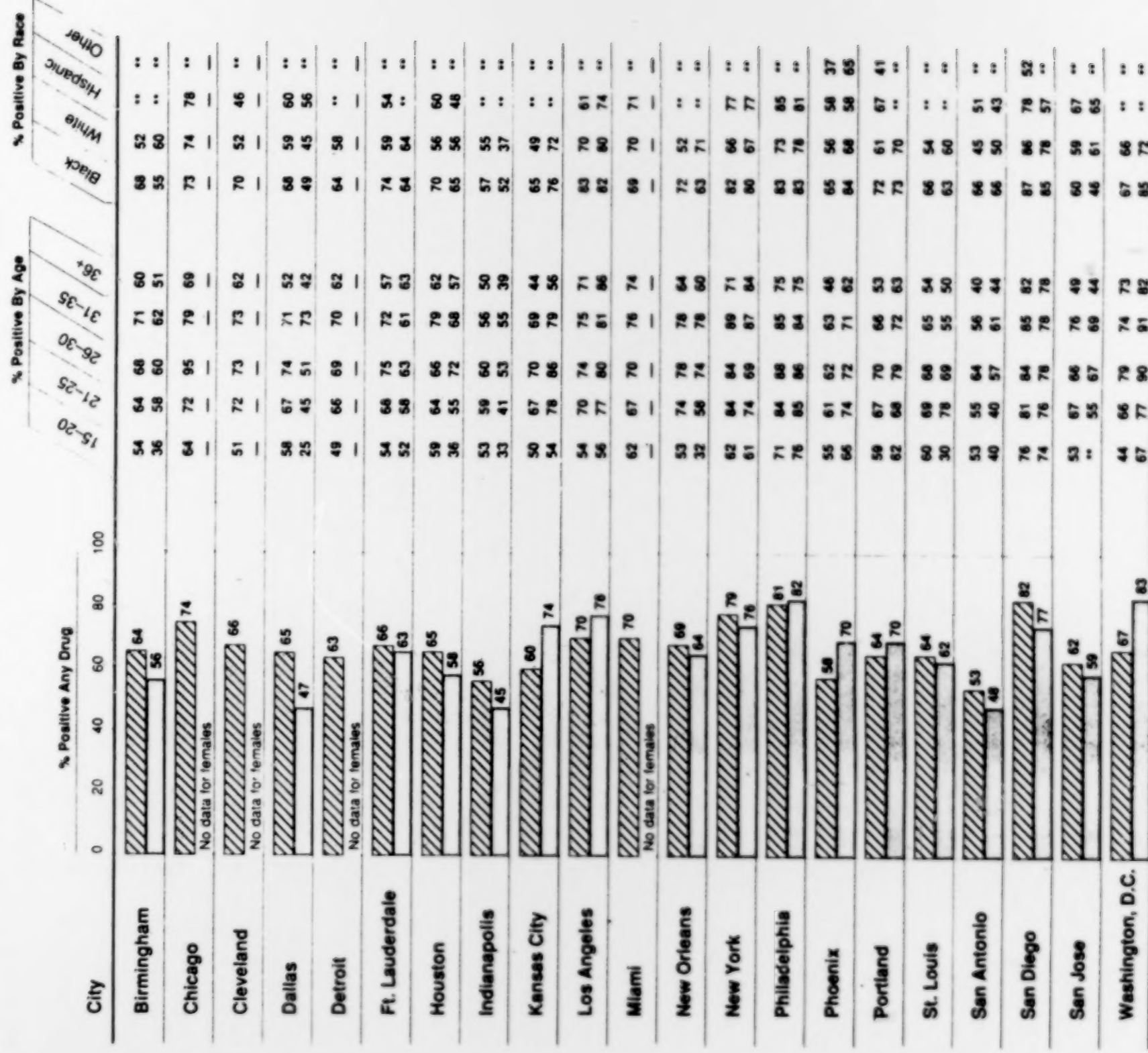
Source: National Institute of Justice/Drug Use Forecasting Program

* Positive urinalysis, January through December 1988

.. Less than 20 cases



Any Drug Use by Male and Female Arrestees 1989*



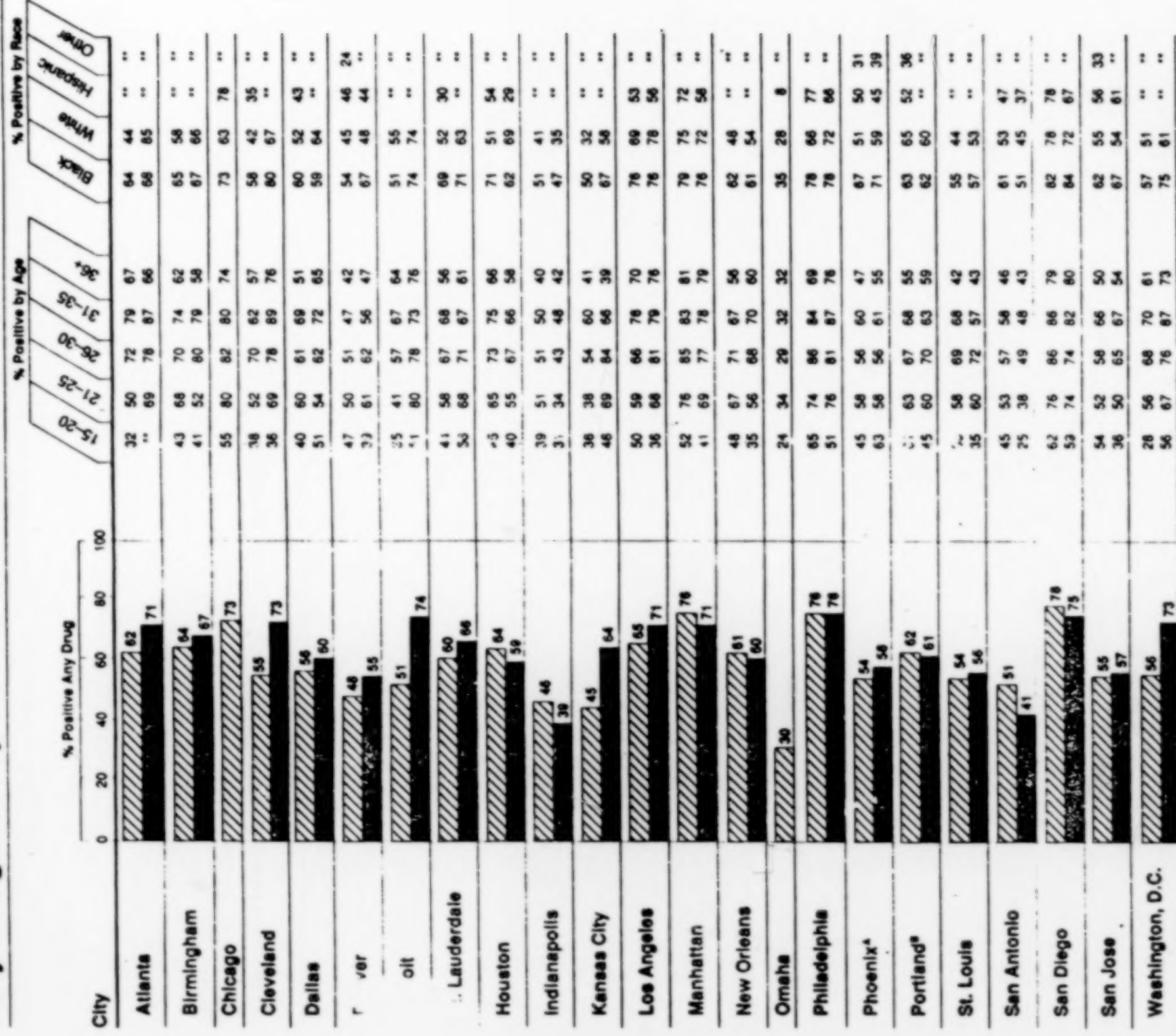
Source: National Institute of Justice/Drug Use Forecasting Program

* Positive unanalysis, January through December 1989

** Less than 20 cases

Males
Females

Any Drug Use by Male and Female Booked Arrestees*



Source: National Institute of Justice Drug Use Forecasting Program

* Positive by urinalysis, January through December 1990

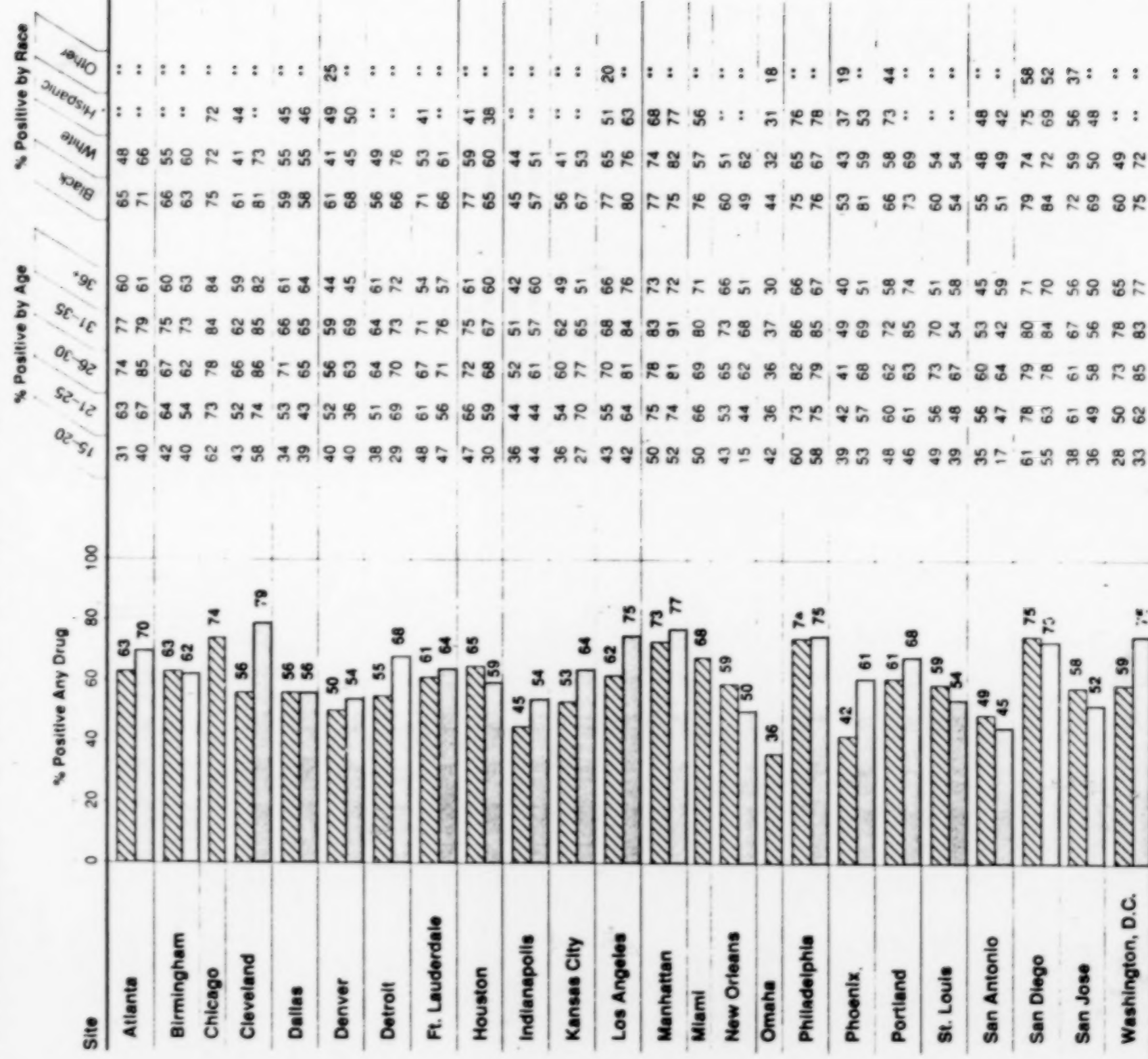
.. Less than 20 cases

* Site does not test males for methadone, barbiturates, and propoxyphene; does not test females for methadone and barbiturates

* Site does not test for methadone, methadone, and propoxyphene

 Males
 Females

Any Drug Use by Male and Female Booked Arrestees



Source: National Institute of Justice/Drug Use Forecasting Program

Note: Positive by urinalysis, January through December 1991. Drugs tested for include cocaine, opiates, PCP, marijuana, amphetamines, methadone, methamphetamine, benzodiazepines, barbiturates, and propoxyphene.

.. Less than 20 cases.

Males
 Females

Drug Use by Charge at Arrest*

Charge	Males		Females	
	Total N	% positive for any drug	Total N	% positive for any drug
Assault	1711	55	422	53
Burglary	1701	75	232	72
Damage/Destroy Property	226	55	44	57
Drug Sale/Possession	2652	83	964	83
Family Offense	425	50	94	51
Flight/Escape/Warrant	488	68	199	72
Fraud/Forgery	415	58	302	55
Homicide	263	57	37	46
Larceny/Theft	2321	71	1200	61
Probation/Parole Violation	481	64	142	64
Prostitution	145	59	700	82
Public Peace/Disturbance	981	58	344	56
Robbery	990	73	107	75
Sex Offenses	418	44	**	--
Stolen Vehicle	1080	64	89	73
Stolen Property	356	70	80	59
Traffic Offense	106	37	316	45
Weapons	675	63	73	62
Other	745	56	437	59
Total	16179	67	5798	66

Source: National Institute of Justice/Drug Use Forecasting Program

* Positive by urinalysis, January through December 1989. Drugs tested for include cocaine, opiates, PCP, marijuana, amphetamines, methadone, methaqualone, benzodiazepine, barbiturates, and propoxyphene

** Less than 20 cases